United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4220

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v. NO. 76-4220

BARTON MANUFACTURING CORP.,

Respondent,

B
Pls

On Application For Enforcement of an Order of
The National Labor Relations Board

Brief For
Barton Manufacturing Corp.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 76-4220

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BARTON MANUFACTURING CORP.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
BARTON MANUFACTURING CORP.

STATEMENT OF THE ISSUE

Whether, because of the patently erroneous findings of the Administrative Law Judge, and the drastic changed circumstances after the issuance of the order of the National Labor Relations Board, including but not limited to the reinstatement offer and rejection of the employee, the execution of a general release by the employee in favor of the employer, and the subsequent and present incarceration of the employee for felonious conduct, this Court can exercise its

equity discretion and deny enforcement on grounds of mootness.

Whether, furthermore, because of the de minimus nature of the alleged infraction, the clear and unequivocal compliance by the employer with the substantive directives of the Board and the reasonable expectation of future compliance as evidenced by no subsequent complaints having been lodged, this Court should deny enforcement on grounds of mootness and equity.

It is strongly urged that the issue before this Court is not whether the employer failed to timely file proper exceptions with the Board, since it is the employer's contention that that is an issue of fact which is very much in dispute in any event. It is rather, however, the question as to whether this Court can, when the circumstances clearly and unequivocally indicate that enforcement of the Board's orders would either be unconstitutional in view of the existence of the employee's general release, whose validity and execution has never been challenged, deny summary enforcement.

As the Labor Board has refused to append as the exhibits before the Court, certain germane documents which it is submitted are essential for the Court to make a determination as to the mootness of the issue before it, the employer has provided its own appendix. It is emphasized that the appendix supplied by Elliott Moore is not <u>the</u> record under consideration, but solely those records that the Labor Board chooses over the employer's objections to submit to this Court.

The issue, in sum, which this Court should and must decide herein, is whether the supremacy of the judicial system and the equity powers given thereto can be exercised in a context where common sense, rationality and justice clearly demand it.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. § 151, et. seq.), for enforcement of its order issued on May 2, 1975, and reaffirmed on October 14, 1975, against Barton Manufacturing Corp. (the "Company"). [1/] The Board's Decision and Order (A. 2-12, 19-22) [2/] was issued by a three-member panel of the Board consisting of Members Jenkins, Kennedy and Penello, and is reported at 217 NLRB 720. This Court has jurisdiction, the unfair labor practices having occurred in Freeport, New York.

STATEMENT OF THE FACTS

In June, 1974 the employer discharged the employee, one Earl Thrane, because of the latter's alleged insubordination, bad work habits and generally uncooperative attitude.

1/ Previously, by motion dated October 5, 1976, the Board had asked this Court for summary entry of a judgment enforcing its order in this case. By an order dated December 9, 1976, this Court (Circuit Judges Moore, Anderson and Feinberg) denied the Board's motion "without prejudice to go forward with enforcement proceedings." The instant proceeding then followed.

2/ "A." references are to the portions of the record printed as an appendix to the parties's briefs. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Shortly thereafter, a complaint was lodged with the National Labor Relations Board on Thrane's behalf by a local union, which has been attempting unsuccessfully for several years to get into the employer's plant, and indeed, had approached the employer and its attorney hitherto with various financial offers and other inducements of a curious and dubious nature, including but not limited to, veiled threats of physical violence.

A hearing was held before a somnabulent Administrative Law Judge on November 6th and 7th of 1974, and a decision was rendered on January 31, 1975, in which the companywas adjudged to have violated Section 8 (a) (1) and (3) of the National Labor Relations Act. The Judge recommended that the Board issue its customary order in the case.

During the next several months, subsequent to the issuance of the order, and while the various procedural niceities outlined in detail in the brief for the Labor Board were taking place, the object of the Board's solicitude was making his whereabouts unknown to the employer who had been instructed by counsel to make an offer of reinstatement so as to minimize any potential liability should the appeal or the subsequent judicial determination be ultimately against them.

As detailed by the appendix, Exhibit A, part of the reason may be Mr. Thrane's incarceration for a brief period, and presumably his other troubles with the law.

In late May,however, Mr. Thrane did appear at the offices of the employer demanding sums of money. After limited discussion, the employer offered to reinstate Thrane (see Exhibit B) and in addition, give Thrane the sum of $750. in lieu of any alleged back pay claims. Mr. Thrane accepted the $750., and gave

a general release to the employer (see Exhibit C). However, he rejected the offer indicating that he did not want to work for the company. Mr. Thrane did not, however, end his association with the company that day, for sometime later, in June, he apparently entered the offices of the employer, and obtained a number of blank checks which were subsequently fraudulently endorsed and negotiated in various locations in town.

Throughout the summer months, when the employer became aware of the forged instruments having been cashed by Thrane, a concerted effort was made to ascertain his whereabouts. A great deal of credit must be given to Elizabeth Kenney of the National Labor Relations Board Brooklyn office, who purports to have been in communication with Mr. Thrane throughout the summer of 1975, for she could have been of great assistance as an officer of the Court to the Nassau County Sheriff's Office in attempting to effectuate Mr. Thrane's arrest on a variety of charges detailed in Exhibit A.

However, as indicated by the Labor Board's computation of back pay due to Earl Thrane, Exhibit E, Thrane had skipped town and was in Chicago and then St. Louis, keeping, presumably, a low profile therein.

As cutely indicated on Exhibit E, during the first, second and third quarters of 1976, Earl Thrane was "out of the labor market." To put it somewhat more bluntly, Mr. Thrane was in and out of jail, being held on charges ranging from, inter alia, armed robbery, to grand larceny.

At the present time Mr. Thrane is awaiting the outcome of a probation report (see Exhibit F) which will be determining for how long he will be employed by the State of New York in the next several years.

While Thrane was having his difficulties with the law, the employer had complied with each and every other aspect of the order which the Board seeks summary entry of. The company posted its notice informing the employees of their rights, and took other steps to insure the employee's the full freedom in exercising their rights. There have been no alleged unfair labor practices for the past three years; there has been no union or labor agitation with respect to the employer for the past three years; and with the exception of the preposterous and illegal attempt by the Labor Board to extract more money from the employer for Thrane, despite the existence and unchallenged validity of the general release, there is no outstanding issue whatsoever remaining to be resolved.

ARGUMENT

POINT I

THE COURT OF APPEALS HAS DISCRETION TO DENY ENFORCEMENT OF BOARD ORDERS

Under Section 10 (e) of the Act, the Court of Appeals is vested with discretion to deny or grant enforcement of N.L.R.B. orders. Universal Camera Corp. v. N.L.R.B. (340 U.S. 474, 95 L.Ed. 456, 71 S.Ct. 456, 1951). N.L.R.B. v. Jones and Laughlin Steel Corp. (331 U.S. 416, 91 L.Ed. 1575, 61 S.Ct. 1274). Recently, the Supreme Court has reiterated the fact that it is the courts of appeals that are charged with the primary and usual responsibility for granting or denying enforcement of Board orders. N.L.R.B. v. Raytheon Co. (388 U.S. 25, 28, 1.Ed. 21, 25, 90 S.Ct. 1547, 1970).

> "Because the powers conferred upon this court by the National Labor Relations Act to enforce the orders of the Board are equitable in nature, and may be invoked only if the relief sought is consistent with the principles of equity." N.L.R.B. v. National Biscuit Co. 155 F2d 123, 124, CA 3 1950, N.L.R.B. v. Globe Automatic Sprinkler Co. 199 F2d 64. This court should

exercise its discretion and deny enforcement of the Board's order.

In N.L.R.B. v. National Biscuit Company, supra the court declined to enforce the Board's order to the extent that it required the employer to reinstate a discharged employee and post the usual notices because the employee had declined reinstatement, and accepted back pay, and the employer had posted the Board's notices (although it did not say onthe notices they were being posted pursuant to the Board's order). The court said that principles of equity constrained it from entering "a mandatory injunctive decree requiring respondent to do things which it has already done." N.L.R.B. v. National Biscuit Company, supra at 124.

In the case at bar, respondent has posted the notices and offered the discharged employee reinstatement and back pay. The employee accepted back pay, but signed a statement declining employment. The principles of equity also dictate that respondent should not be forced to rehire a discharged employee who they are prosecuting for theft of company checks.

POINT II

THE COURT OF APPEALS SHOULD EXERCISE ITS DISCRETION TO EVALUATE THE IMPACT OF CHANGING CIRCUMSTANCES UPON THE BOARD ORDER AND DENY ENFORCEMENT ON GROUNDS OF MOOTNESS.

This principle was first enunciated by the Supreme Court in N.L.R.B. v. Jones and Laughlin Steel Corp. where the court said:

> "When circumstances do arise after the Board's order has been issued which may affect the propriety of enforcement of the order, the reviewing court has the discretion to decide the matter itself or remand it to the Board for consideration. For example, where the order obviously has become moot, the court can deny enforcement without further ado. 331 U.S. 416, 428, 91 L.Ed. 1375, 67 S.Ct., 81 (1946). N.L.R.B. v. Grace Co. 184 F2d 126, N.L.R.B. v.

Culinary Alliance Hotel and Service Employees Union Local 402 439 F2d 1378, (CA 1971, Amalgamated Clothing Workers of American v. N.L.R.B. 324 F2d 228, CA 21, 1963.

In N.L.R.B. v. Globe Security Services the court refused to enforce the Board's order because "enforcement would be vain and useless as the bargaining unit the employer was ordered to bargain with is not existant" (3CA 1977, 94 LRRM 2593). General Engineering v. N.L.R.B. 311 F2d 570, CA 9 1970, N.L.R.B. v. Cosmopolitan Studios Inc. 291 F2d 110 (CA2 1961), International Longshoreman's Association, Independent, v. N.L.R.B. 277 F2d 681 (CADC 1960).

The order the Board seeks to enforce is moot because respondent has posted the notices, Thrane signed a general release for a sum of money for his alleged back pay, and signed an agreement saying he did not desire reinstatement. The cease and desist order is moot because respondent has complied with it and the fact that in the two years subsequent to Thrane's dismissal, no further complaints have been issued show that such conduct will not be repeated by respondent.

An enforcement proceeding will become moot because a party can establish that "there is no reasonable expectation that the wrong will be repeated." N.L.R.B. v. Raytheon supra at 27 citing U.S. V. W. T. Grant Co. 345 U.S. 629, 633, 97 LEd. 1303, 73 S.Ct. 894 (1953). N.L.R.B. v. Marland One-Way Clutch Co., Inc. 520 F. Supp. 856 (CA 7, 1975).

POINT III

THIS COURT SHOULD DECLINE TO ENFORCE THE BOARD'S ORDER BECAUSE OF THE DE MINIMUS NATURE OF THE VIOLATION AND AN ABSENCE OF ANY SHOWING OF A COURT DECREE IS NECESSARY

The Board found an 8 (a) (1) violation based upon the discharge of

Thrane and Thrane's testimony of anti-union statements by the agent firing him. Present knowledge, to wit, Thrane's criminal record, theft from respondent, driving with a suspended license, substantiate that his discharge was inter alia for cause. These circumstances mitigate against any exceptional anti-union bias as found by the Board. This is clearly a "case in which a minimum amount of investigation of the Board would have avoided pursuing the enforcement petition on the heavily congested docket of the court." N.L.R.B. v. U. S. Gypsum Co., 393 F2d 86s, th CA, 1968, 68 LRRM 2253. In that case the Board found the company had committed 8 (a) (1) (3) and (5) violations by unilateral reclassification of three employees. Within thirty days of the Board's order the company reclassified the employees with back pay and posted the Board's usual notice. The court also noted that the Board had notice of compliance "at least" from respondent's brief. In the case at bar the Board was notified by counsel in June of 1976 of compliance and the subsequent occurances which make this proceeding merely an exercise of form over substance.

The Board also based its findings on alleged anti-union remarks made by respondent's agent. While subsequent events cast doubt upon the veracity of those allegations, even if, as the Board found, they were made, they were, at worst ill-chosen and therefore a de minimus violation and the court should decline to enforce the Board's order. J.J. Newberry Co. v. N.L.R.B. 442 F2d 897 CA2 1971, 77 LRRM 2097.

The cease and disist order is based on equivocal events of over two years ago. In N.L.R.B. v. Eavet, the court declined to enforce a cease and desist order based on facts two years old. The court held that "an enforcement decree ought not to be entered in this case in the absence of any showing whatever,

based on reasonably recent inquiry, that a decree of court is appropriate or necessary." 179 F2d 15, 22 (1949). An order of the court must be appropriate for present enforcement. C-B Brick Inc. v. N.L.R.B. 506 F2d 1086 (CA 3 1974).

The Board has made no showing that the enforcement of its order of over two years ago is appropriate or necessary. Events subsequent to the order, to wit, employer-employee harmony, Thrane's incarceration, theft of company checks and settlement bear out respondent's contention that enforcement is unnecessary.

CONCLUSION

The Labor Board would urge upon this court that this is not the time nor the forum to raise the issues which have been proffered herein. It is their contention sub silentio that the issues as to the general release, the offer and rejection of a job, Thrane's theft of the employer's checks, his criminal difficulties and his pending incarceration are all not properly before this court, but are matters which should await the outcome of an administrative hearing in the enforcement proceedings.

In the event, argues the Labor Board, sub silentio, that a determination in the enforcement hearings is made which is objectionable to the employer, that he then has appropriate recourse to this court for a judicial review of all of the allegations raised in this brief. While the company, of course, does not wish to be insensitive to procedural niceties, and is also mindful of the Board 's need to put its bright, legal talent to work, and not have them idle for lack of cases, it is respectfully submitted that this court does and should

exercise the authority vested in it to unequivocally say that the"Emperor is not wearing any clothes." The Labor Board may well have inexhaustible resources to continue unabated its in depth probe of this eight-employee, three-working partner firm in Freeport, Long Island; however, it is respectfully argued that this court has the humanity, the intelligence and the wisdom at this point in time to say "call it quits."

There is not one scintilla of doubt that, indeed, to this very Court we will, of necessity, have to return, should it not make short shrift now and finally of the Labor Board's absurd position.

An inkling of that necessity has been evinced by their "ubiased fact findings" in their back pay computation that the employer owes Thrane over $3,000. for a period of time when Thrane was either in jail or awaiting trial.

This case is absurd; the Labor Board's position is absurd; and it is hoped and anticipated that this Court can and does exercise reasonable powers to finalize this factually bizarre case.

Jon Emanuel
Attorney for Respondent
170 Broadway
New York, N.Y. 10038

NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on 19

at M.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

Index No. Year 19

CIRCUIT COURT OF APPEALS
SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner,

v.

BARTON MANFACTURING CORP.

Respondent.

AFFIDAVIT OF SERVICE

JON EMANUEL
Attorney for Defendant
Office and Post Office Address, Telephone
170 Broadway
New York, NY

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

1500—JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS, N.Y.C. 10013

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification by Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

MIRIAM WOLOVITS being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at BROOKLYN NY

Check Applicable Box

☐ Affidavit of Service By Mail — On April 12 19 77 deponent served the within Brief for Barton Manufacturi Corp. upon NATIONAL LABOR RELATIONS BOARD attorney(s) for Petitioner in this action, at Washington, D.C. the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on April 12 1977

Miriam Wolovits
The name signed must be printed beneath

MIRIAM WOLOVITS

[signature]
Notary Public, State of New York
No. 4510102
Qualified in Westchester County
Commission Expires March 30, 1978